SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

MARCH TERM, 1969

No. 1105

IRVING A. BERK, d/b/a BERK TRADE SCHOOL
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

A Writ of Certiorari is respectfully sought to review the order of the Court of Claims dismissing the petitioner's petition on motion of respondent for summary judgment.

Opinion Below

There was no report of opinion by the court below. The opinion of the court below is set forth in "Appendix A", to this petition.

Jurisdiction

Jurisdiction is invoked pursuant to 28 U.S.C.A. § 1255 (1), to review an order of the United States Court of Claims, filed October 4, 1968, which granted defendant's motion for summary judgment and dismissed the petition of petitioner therein.

There was no order respecting rehearing. Extension of time in which to file a Petition for Writ of Certiorari through March 3, 1969, was granted by order of Mr. Justice Harlan, on January 7, 1969.

Questions Presented

The respondent made a motion for summary judgment claiming the petitioner's claim was barred by the Statute of Limitations in response to which petitioner submitted a brief in opposition. The respondent then submitted a reply brief demanding relief of dismissal on the ground of "res adjudicata". The court dismissed the petition on the ground of "res adjudicata".

1. Whether the Court of Claims acted improperly and in violation of its rules and the rights of petitioner by granting relief to respondent, and upon grounds not stated or requested in its motion application, but only in its reply brief and without affording petitioner an opportunity to respond to the new motion contained in respondent's reply brief.

2. Whether the Court of Claims improperly concluded that the petitioner's claim in the Court of Claims had "already been satisfied as a result of a judgment" in the District Court of the Eastern District of New York.

Statutes Involved

Rules 11 and 12 of the Rules of the Court of Claims, set forth in "Appendix B", *infra*.

Statement

The petitioner herein commenced an action in the United States Court of Claims to recover the sum of $72,201 earned by petitioner for services and materials provided pursuant to successive contracts with the government.

By Certificate of Indebtedness dated March 9, 1962 and issued by the Comptroller General of the United States, the respondent acknowledged its indebtedness to the petitioner in that amount.

After the commencement of the action, the respondent made a motion for summary judgment on the sole ground that the action was barred by the Statute of Limitations (28 U.S.C. 2501).

The petitioner submitted a brief in opposition proving that the action was commenced within the statutory period. Then the respondent submitted a "Defendant's Reply Brief" which requested dismissal on the ground of "res adjudicata." The petitioner then served and submitted to the court a brief in response to the Reply Brief opposing the Reply Brief on the grounds that: 1) the Reply Brief pleaded new matter and was unauthorized by the Rules of the Court of Claims, and 2) that the action was not barred by "res adjudicata."

This last brief of the petitioner was rejected by the court and returned to petitioner since briefs in response to reply briefs are not authorized by the rules of the court. The court then issued the order appealed from here granting the relief requested in the Respondent's Reply Brief.

Reasons for Granting the Writ of Certiorari

I.

The order of the court below is wholly without the authority of the court as set forth in the Rules of the Court of Claims and in violation of the meaning and intention of the Rules and motion practice.

Rules 11 and 12 set forth the sole method of making a dispositive motion in the Court of Claims. Such motion shall be in the form of a motion, in writing, and to which the opposing party may submit objections and responses within 30 days after service. The moving party then has 15 days to file a reply brief, to which there is no authorized response as a matter of right.

Respondent's original papers, in conformity with the Rules, was titled a "Motion for Summary Judgment," and it presented the "Question: Whether plaintiff's claim is barred by 28 U.S.C. § 2501 . . .?" The Conclusion stated only that the "plaintiff is barred by the Statute of Limitations.

The Reply Brief was such only in designation since it did not reply to petitioner's brief but was in reality a new motion albeit not on the form of an application or motion.

Although petitioner received the Reply Brief there was no 30-day notice to petitioner and it did not afford the petitioner the opportunity to respond or object as a matter of right. In fact, petitioner's responsive brief was rejected. It did not permit a responsive brief as a matter of right and yet granted the new relief claimed upon the new ground stated in the Reply Brief.

The Court thus issued an order upon a motion not authorized by its Rules and did not afford the petitioner the opportunity of responding.

II.

The court below improperly concluded that Petitioner's claim had been satisfied by a prior judgment.

The petitioner's brief which was refused and not considered by the Court of Claims explained that the prior judgment referred to in its order is presently on appeal.

In the District Court of the Eastern District of New York, the United States sued the petitioner for approximately $94,000. The complaint in that action stated and admitted that the United States owed petitioner $72,201. The complaint credited petitioner with this amount and claimed as damaged the difference of approximately $22,000. Petitioner's Answer in that action asserted a denial and counterclaim to recover $72,201.

At the trial the defendant's counterclaim was dismissed for lack of jurisdiction but without prejudice to his commencing a new cause of action in the Court of Claims for $72,201.

After trial, Judge Zavatt decided that the government by mistake had overpaid petitioner $94,000 and after deducting the $72,201 as a credit, rendered judgment to the government for the balance.

The petitioner then filed a notice of appeal from the District Court judgment. The transcript has been obtained at a cost of over $800. The record on appeal has been docketed at the Circuit Court of Appeals, Second Circuit and the appeal will be perfected in approximately one month.

If the District Court judgment is reversed, as petitioner believes it will be, it will be only on the ground that the government's claim against petitioner is unfounded, and

therefore that there is no money owed by petitioner against which to credit the $72,201 which is admittedly owed to petitioner. If the appeal pending is successful then there is obviously no bar to the action in the Court of Claims.

The petitioner's brief in response to the Reply Brief which was rejected and returned, finally urged the court to dismiss the respondent's request based on "res adjudicata" without prejudice pending the outcome of the appeal pending in the Circuit Court of Appeals.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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MOE D. KARASH,
Of Counsel.

APPENDIX A

IN THE

UNITED STATES COURT OF CLAIMS

No. 93—68

IRVING A. BERK, d/b/a Berk Trade School

v.

THE UNITED STATES

Before Cowen, *Chief Judge,* Laramore, Durfee, Davis, Collins, Skelton and Nichols, *Judges.*

ORDER

This case comes before the court on defendant's motion, filed April 18, 1968, for summary judgment. Upon consideration thereof, together with the response in opposition thereto, without oral argument, it is concluded that plaintiff's claim has already been satisfied as a result of the judgment of the United States District Court for the Eastern District of New York in *United States of America* v. *Irving A. Berk d/b/a Berk Trade School,* No. 63-C-960, and

IT IS ORDERED, that defendant's said motion for summary judgment be and the same is granted and plaintiff's petition is dismissed.

By the Court

Oct. 4, 1968

.....

Chief Judge

APPENDIX B

Statutory Provisions Involved

Rules of the Court of Claims of the United States

Rule 11. Motions and Related Papers

(a) Content of Motions: Every application to the court or the commissioner for an order shall be by written motion filed with the clerk. The motion shall state with particularity the grounds therefor and shall set forth the relief or order sought.

Rule 12. Motions: Dispositive and Procedural; Objections and Responses

(a) Dispositive Motions Defined: Dispositive motions include . . . (3) motions to dismiss (Rule 67); (4) motions for summary judgment (Rule 64).

(b) Time for Filing: (1) Objections and Responses to Dispositive Motions: Objections or a response to a dispositive motion shall be filed within 30 days after the service of such motion.

(2) Reply Briefs: The moving party shall have 15 days from the date of the service of the objections or response to such motion within which to file a reply brief.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1105

IRVING A. BERK, d/b/a Berk Trade School,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the Court of Claims (Pet. App. 7) is reported at 185 Ct. Cl. 793.

JURISDICTION

The order of the Court of Claims was entered on October 4, 1968. On January 7, 1969, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari to and including March

3, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims properly dismissed petitioner's claim on the ground that it had already been satisfied by a judgment of another court.

STATEMENT

Petitioner and the Veterans Administration entered into a number of contracts covering the period between 1948 and 1960 pursuant to which petitioner agreed to provide certain instruction and supplies incident to the vocational training of veterans. On March 9, 1962, the General Accounting Office sent petitioner a certificate of indebtedness with regard to these contracts. It stated that the government held some $72,000 owed to petitioner under the contracts, but also asserted that, due to use of incorrect cost data and billing for hours in excess of actual attendance, petitioner had been overpaid by about $94,000. It therefore requested petitioner to repay to the government some $22,000.

When petitioner failed to repay this amount, suit was brought by the United States in the United States District Court for the Eastern District of New York on August 26, 1963. Petitioner filed a counterclaim for the $72,000 allegedly due him. While the district court action was still pending, petitioner, on March 12, 1968, brought the instant action in the Court of

Claims to recover the same $72,000 asserted as a counterclaim in the other proceeding.

On April 18, 1968, the government moved for summary judgment in the Court of Claims action on the ground that the suit was barred by the statute of limitations. Petitioner, on June 13, filed his response to this motion. On July 19, in an extensive opinion, the Eastern District of New York held that the government was entitled to recover the $94,000 overpayment less the $72,000 withheld, or $22,000, from petitioner.[1] Consequently, on July 29, the government filed a reply brief in the Court of Claims action. This brief set out the district court's decision and asserted that, as a result, the Court of Claims action was barred since petitioner had already been credited with the $72,000 allegedly due from the government under the contracts. It noted that the government would have no objection if petitioner wished to file further papers in response to this new assertion.

At some unspecified time during the next two months, petitioner alleges that he submitted such a response to the Court of Claims, but that it was rejected by the court (Pet. 3).[2] In any event, on October 4, 1968, the Court of Claims issued an order granting the government's motion for summary judgment and dismissing petitioner's suit on the ground that "plaintiff's claim has already been satisfied as a

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[1] That opinion, rendered in *United States* v. *Irving A. Berk d/b/a Berk Trade School*, No. 63-C-960 (E.D.N.Y.), is not yet reported.

[2] We are informed by the Clerk of the Court of Claims that that court has no record of such a submission.

result of the judgment of the United States District Court for the Eastern District of New York * * *" (Pet. App. 7).

ARGUMENT

Petitioner's basic contention is that since the district court judgment in favor of the government is presently on appeal, it should not have been given *res judicata* effect by the Court of Claims (Pet. 5-6). He cites no authority for this proposition, and the established rule is precisely the contrary. *E.g.*, *Huron Corp.* v. *Lincoln Co.*, 312 U.S. 183, 188-189. Acceptance of petitioner's view would allow multiple proceedings to race each other toward finality, with attendant confusion and a substantial possibility for unfairness to the successful litigant in the court with the slower appellate review procedures (see generally 1B Moore, *Federal Practice*, ¶¶ 4.416 [3], [4], pp. 2251-2283). Should the Second Circuit reverse the decision of the district court, petitioner may then move to reopen the Court of Claims judgment under Rule 69(b)(5) of that court, which expressly allows relief from a judgment on the ground that "a prior judgment upon which it is based has been reversed * * *."[3]

Petitioner also contends (Pet. 4) that the government should not have been allowed to raise a new

[3] Of course, if the Second Circuit affirms the district court's decision and certiorari is not sought or is denied, petitioner will be barred from any recovery on these contracts—he does not dispute that the judgment of the district court gave him full credit for the $72,000 withheld by the government.

ground in support of its motion for summary judgment in its reply brief of July 29, 1968. However, he points to no provision in the court's rules requiring a party to file a separate motion for summary judgment upon learning of a new ground supporting its original motion. He does not allege that he filed a motion for leave to file a supplemental brief, and the Court of Claims docket entries do not reflect the filing of any such motion. Nor did he file a motion for rehearing under Court of Claims Rule 68. In any event, petitioner has not stated any legal ground of which he could have informed the court below that would have supported an opposite holding. Therefore, even if there were merit to petitioner's claim of procedural irregularity in the proceedings before the Court of Claims, there was no prejudice to him.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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